In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
JACKSON, MISSISSIPPI,
Petitioner,

VS.

ROBERT L. ROPER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Petitioner's basic position remains the same and the salient points in support thereof have been covered in its initial brief. For clarification, we submit the following comments upon some of the arguments advanced in opposition.

I.

No Appeal Was Taken on Behalf of Nominal Plaintiffs and Issue Is Dead Also for This Reason

At page 3, respondent surprisingly states that "The contents of phraseology of the Notice of Appeal were never mentioned by the bank in the Court of Appeals." This simply is not so. The bank filed its "Motion to Dismiss Appeal for Want of Jurisdiction" and assigned four specific grounds as follows: (A. 64-65)

1. The case is moot as to the two individual plaintiffs because the plaintiffs have received a money judgment for all relief demanded.

2. The Notice of Appeal does not attempt to appeal from the final judgment in favor of the individual plaintiffs but seeks only an appeal "on behalf of all others similarly situated to themselves and on whose behalf the named plaintiffs sought class action treatment, . . .".

3. The "all other similarly situated" to plaintiffs on whose behalf the appeal is noticed are non-parties and have no standing to request review because there is no certification of this case as a "class action" under Rule 23 of the Federal Rules of Civil Procedure.

4. There is no justiciable "case or controversy" before the Court on which jurisdiction may be exercised prudentially or under Article III, § II, of the Constitution of the United States.

The absence of any appeal by the nominal plaintiffs in their own right concludes any debate about the sufficiency and effectiveness of the tender of satisfaction on which the order dismissing the Complaint is based. (A. 60-61)

II.

Wish to Spread Expense and Emotional Involvement Does Not Supply Personal Stake

At page 6, respondent suggests that the personal interest stake is not lost because there is the "prospect of spreading of generally non-taxable expense items". We submit that such a prospect does not supply the personal interest stake. The "spreading" refers to the shifting of expenses to others of the "class" who might fail to opt

out on notice after a certification of the case as a class action. The "prospect" is that the Court might require these solicited parties to share the expense of securing the class certification.

The facts are not in dispute. The defendant has tendered to the named plaintiffs all that they demand, plus legal court costs, which is all that could ever have been recovered against the defendant in the case before the Court.

There is nothing left for the named plaintiffs to recover which can be recognized as an item in litigation. The so-called "generally non-taxable, out-of-pocket expenses" are not recoverable items in litigation.

The extreme importance of rejecting respondent's argument on this point lies with the fact that if "generally non-taxable, out-of-pocket expenses" can supply the required personal stake ingredient of a "case or controversy", *then no class action attempt could ever become moot, because every such attempt will, of necessity, involve some such generally non-taxable, out-of-pocket expenses.*

Of equal concern, and for like reason, is the hypothesis that the self-appointed class champions run the risk of loss of "personal respect and credibility" for having failed to obtain certification. This emotional factor could also be suggested in every case to prevent the case from ever becoming moot.

If either of these concepts is allowed to prevail, mootness will be totally foreign to all cases cast in class action form.

The Fifth Circuit said that if a defendant may "short circuit" a class action by paying off the class representative, and if it were so easy to end class actions, few would

survive. While this view that some way must be found for class actions to survive does not expressly adopt respondents' argument, it is consistent with it.

That class action attempts will, from time to time, perish in this fashion is not to be denied. On the other hand, if the Fifth Circuit's philosophy becomes the law of the land, then *every* class action will survive and live on to a ripe old age.

Is it better that some class actions perish or that all Rule 23(b)(3) class actions survive at any cost? Will the Court adhere to the "personal stake" test for jurisdictional purposes and thereby permit some Rule 23(b)(3) class action attempts to perish, or will the Court embrace the philosophy that whenever a complaint is filed as a class action, a way *must* be found to keep it alive after death of the controversy between the named parties before the Court?

The only subject matter involved here is the recovery of money. Therefore, the personal stake must be a money stake, because there is nothing else involved out of which to construct a case or controversy. Therefore, when the named plaintiff no longer has a personal money stake in the outcome, the case as to him is moot. *Indiana Employment Security Division v. Burney,* 409 U.S. 540, 93 S.Ct. 883 (1973).

To maintain a money stake, the plaintiff's financial interest must be real and direct. In *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669 (1974), the Court, after announcing this rule, applied the jurisdictional truism to class actions, saying:

> ". . . Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. Bailey v. Patterson, 369 U.S. 31, 32-33, 82 S.Ct. 549, 550-551, 7 L.Ed.2d 512 (1962); Indiana Employment Division v. Burney, 409 U.S. 540, 93 S.Ct. 883, 35 L.Ed.2d 62 (1973). See 3 B. J. Moore, Federal Practice, ¶23.10-1, n. 8 (2d ed. 1971)." (94 S.Ct. at 676)

There can be no remaining financial interest at stake when the plaintiff has recovered all that he claims or the law allows. There is absolutely no plaintiff before the Court who has not received full satisfaction. To be sure, a "nexus" is required to qualify a class champion to represent the class, but a "nexus" is no substitute for a financial interest stake in a Rule 23(b)(3) action. There is nothing real or "direct" in a residual "nexus", when financial interest is gone.

The concept that a self-styled class representative whose self-appointed status is rejected, may lose "personal respect and credibility" for having received satisfaction is no more than an emotional approach, and this is not enough to meet the case or controversy requirement, as was held in *Ashcroft v. Mattis,* 431 U.S. 171, 97 S.Ct. 1739 (1977):

> ". . . Emotional involvement in a lawsuit is not enough to meet the case or controversy requirement; were the rule otherwise, few cases could ever become moot." (97 S.Ct. at 1740)

When challenged, jurisdiction must rest upon facts alleged and proven and the party asserting jurisdiction has the burden of proof and persuasion. *McNutt v. General Motors Acceptance Corp. of Indiana,* 298 U.S. 178, 56 S.Ct. 780 (1936).

This burden of proving a continuing personal money stake in the case has not been met and the decision of the Court of Appeals can stand only if the "personal stake" test is abandoned in favor of the undefinable "nexus" test as adopted by the Fifth Circuit.

III.

Federal Right of Review Is Always Subject to Article III Challenge

Respondent argues that if the mootness concept is applied here, then the litigant would be deprived of his federal right of review. However, every federal right of review is governed by Article III of the Constitution. No litigant has the right to demand a review unless he can present a live controversy over a personal interest stake to be affected by such a review.

IV.

Alleged Usury Is Not "Capable of Repetition"

Respondent argues that a voluntary cessation of allegedly illegal conduct does not deprive the court of power to hear the case. This argument is coupled with the "capable of repetition, yet evading review" concept.

However, the "capable of repetition" element is obviously missing. The nominal plaintiff has been paid in full. There is no evidence that the nominal plaintiff continues to hold a credit card. In any event, future participation in the credit card program would be purely voluntary. The interest rates have been revised so that there is no possibility that the alleged violation will recur. Mississippi has ratified the charges by making the interest statutes retroactive.

V.

Litigation of Class Issue in District Court Does Not Avoid Mootness

Respondent argues that just because a class action motion is "litigated", it assumes immortality and that it should survive the elimination of the underlying claim of the nominal plaintiff. However, if every issue that is in litigation is to survive only because it has been litigated in some degree, then few cases could ever become moot. Class action attempts are not different and are not unique in relation to survival on or during appeal. As this Court said in *Coopers & Lybrand v. Livesay*, ... U.S. ....., 98 S.Ct. 2454 (1978):

> "There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation. . . ." (98 S.Ct. at 2459)

A jurisdictional standard bearer cannot simply be plucked from a body of unknown and unnamed non-parties, just because a hopeful group of attorneys desire to represent them in a class action on the Court's solicitation.

The mootness question has never been made to turn on whether a procedural issue has been debated at some point in the proceedings.

The class action issue was "litigated" in the cited case of *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (1972), but this Court nevertheless granted certiorari, reversed and remanded with directions to dismiss the case as moot. *Ihrke v. Northern States Power Co.*, 409 U.S.

815, 93 S.Ct. 66 (1972). This action resulted despite the "public interest exception to the mootness doctrine" as adopted in the Eighth Circuit.

VI.

Claim Must Be "Justiciable" in Order to Support Jurisdiction

Respondent argues that mootness must reach all claims in order to be effective. But a "claim" must be a justiciable claim which means at least that it must take form from at least two adversaries who are parties litigant and who have legal standing to present the "claim".

VII.

No Challenged Act of Bank Is Capable of Repetition and No Exception to Mootness Applies

Respondent turns to the concept that a case may be subject to review or the exercise of jurisdiction if a wrongful act is "capable of repetition, yet evading review".

Sometimes loosely called an "exception" to the mootness doctrine, its constitutional justification lies with the underlying likelihood of a repetition of the act in question as against the nominal plaintiff. The prospect of repetition supplies the personal interest stake which keeps the controversy alive as it affects the nominal plaintiff.

Respondent would have the Court eliminate the "capable of repetition" one-half of the exception and sustain jurisdiction only on the basis that the issue could otherwise evade review. To do this, however, is to ignore the only personal interest stake which could link the lawyers' dream to the reality of a live controversy with parties in court.

VIII.

No Prejudice Due to Statutes of Limitations Followed Dismissal

Respondent argues that putative class members will be prejudiced because the statute of limitations will have run against all claims of the class members, citing *American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756 (1974) and *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 97 S.Ct. 2464 (1977).

However, *Utah* extends the limitation period for the time that the class action motion was pending and *McDonald* allows for a timely intervention after class action denial for purposes of appeals, thereby, in combination, affording to a potential plaintiff three options. He could have (1) intervened for purposes of appealing the denial of certification, or (2) he could have filed a new action, or (3) he could have done both. Also, of course, he could have stayed out of Court, which he chose, in fact, to do. Having been afforded these options, prejudice is not apparent. There is no evidence that putative class members relied upon this appeal in any respect or that they had any right to do so.

IX.

There Is No Policy or Other Compulsion to Use Rule 23 in the Circumstances of This Case

Respondent's eulogy of Rule 23 is necessarily in the abstract, because no specific benefit may be found in its use in this case except the benefit to be derived by the lawyers seeking to have the Court solicit for them 90,000 claims.

We take no issue with Rule 23 in the abstract, but as applied in this particular case, it has little to commend it, because the only visible beneficiaries are the lawyers and the aggregation of usury claims under its banner violates the articulated public policy of the bank's home state and is viewed by the state's highest Court as a "legal fraud" and, as such, a misuse of the state's interest statutes.

In *Eisen II, Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (CA 2, 1968), Judge Lumbard, dissenting, observed that:

> ". . . Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. . ." (391 F.2d at 572)

Since Rule 23 is only a procedural device, there should be no judicial compulsion to turn it to questionable purposes or to use it to violate the public policy of the forum state or to minimize the requirements for "case or controversy" jurisdiction.

X.

Right of Review Must Meet the Test of Article III at the Threshold

Respondent cites dictum in two cases, *Coopers & Lybrand v. Livesay*, ... U.S. ....., 98 S.Ct. 2454 (1978), and *United Airlines v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464 (1977), in an attempt to support the argument that a self-appointed class champion may obtain a review of a negative class action order without maintaining a personal interest stake in the underlying claim for a money recovery.

The asserted conclusion is not supported by the cited cases.

In *Coopers & Lybrand v. Livesay*, supra, the Court dealt with the question of whether an order denying a class action certification should be subject to interlocutory appeal or appeal under the collateral source doctrine.

In the process of holding that an order denying class action status was not subject to interlocutory appeal, the Court said:

> ". . . Finally, an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members. United Air Lines v. McDonald, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423. . . ." (98 S.Ct. at 2458)

Respondent reads this language of the Court and similar language in *United Airlines v. McDonald*, supra, as immunizing class action attempts from the force and effect of Article III of the Constitution and the application of the mootness doctrine.

On the other hand, this Court did not speak to these jurisdictional questions in either of the cited cases and there is nothing in the cited cases to suggest that the Court intends to immunize class actions from the "case or controversy" mandate of the Constitution. Respondent's reading of the cases confuses the right to a statutory appeal with the right of the appellate court to exercise jurisdiction.

This Court was careful to emphasize in *Livesay*, supra, that the class action rules do not contain any unique provisions governing appeals and that appeals in such cases are determined by the same standards that govern appealability in other types of litigation. (98 S.Ct. at 2459)

The "class action" format changes nothing. As emphasized by the Court in *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917 (1976):

"The individual respondents sought to maintain this suit as a class action on behalf of all persons similarly situated. That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' Warth v. Seldin, 422 U.S. at 502, 95 S.Ct. at 2207, 45 L.Ed.2d, at 357." (96 S.Ct. at 1925, footnote No. 20)

A right of review is indeed triggered by every final judgment under the provisions of 28 U.S.C., §1291, but standing at the threshold of every statutory appeal and review is the question of the appellate court's jurisdiction to proceed and this is so whether the appeal is one which is interlocutory or one which is taken as of right from a final judgment.

This Court has never suggested that a procedural issue could be used to keep the underlying controversy alive when, on appeal, it appears that there is no appellant before the Court who continues to maintain a personal interest stake in the underlying substantive claim. While the appeal may be duly perfected under 28 U.S.C., §1291, the record does not reach the appellate level free from the threshold question of jurisdiction or with any immunity from the force of Article III or the sweep of the mootness doctrine.

The vital threshold character of this question in every federal case at every level of consideration was emphasized in *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197 (1975):

"In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. . ."

In *Warth v. Seldin,* supra, the Court re-emphasized the point that in a "class action" case, the nominal plaintiffs could not meet the "case or controversy" requirement on appeal or elsewhere in the federal system by resting their claims upon the rights or interests of third parties, concluding:

". . . The Article III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . .' Linda R. S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). See Data Processing Service v. Camp, 397 U.S. 150, 151-154, 90 S.Ct. 827, 829-830, 25 L.Ed.2d 184 (1970)."

Also:

". . . Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. E.g., Tileston v. Ullman, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943). See United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); . . . ." (95 S.Ct. at 2205)

Also:

> ". . . Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless the petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.' O'Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). See, e. g., Bailey v. Patterson, 369 U.S. 31, 32-33, 82 S.Ct. 549, 559-561, 7 L.Ed.2d 512 (1962)." (95 S.Ct. at 2207)

These same standards, applied on appeal, require dismissal of the instant case for mootness.

We return to the factual situation of the present case. Here there was no trial on the merits but instead, there was a dismissal based upon a tender of the total amount demanded by the nominal plaintiffs after class action status had been rejected by the District Court. In this situation, appealability, in its jurisdictional sense, continues to depend upon whether the nominal appellant retains a personal financial stake in the outcome of the case judged by the same standards that govern appealability and review in all other cases.

Applying these "same standards", the nominal plaintiff in the instant case no longer has the necessary personal stake. The lawsuit is headless. All that remains is the desire of a group of lawyers to represent the faceless and unknown members of an unnamed potential class who have manifested no interest whatever in engaging their services and who in nowise appear as parties in court. The case is moot by all standards.

CONCLUSION

This Court has consistently held that when a class champion loses his personal interest stake in the outcome of the underlying claim for relief, the courts no longer retain jurisdiction and that this applies to all courts, at all levels of the federal judicial system.

This Court has never indicated an intention to abandon this jurisdictional concept based, as it is, on Article III of the Constitution. We submit that it should not be abandoned now.

Respectfully submitted,

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